STATE OF MICHIGAN

COURT OF APPEALS

RICHARD R. ROBERTS and STACEY D. ROBERTS, Plaintiffs-Appellees, v ROBERT L. SAFFELL and JOANNE O. SAFFELL, Defendants-Appellants.	UNPUBLISHED May 22, 2014 No. 312354 Leelanau Circuit Court LC No. 05-007063-CK

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

This case is before us for a third time. In the instant appeal, defendants appeal as of right from a postjudgment order of the trial court denying an award of attorney fees and alternatively stating its fee award in the event fees were to be awarded. We previously considered the underlying substantive question of law in *Roberts v Saffell* (*Roberts I*), 280 Mich App 397; 760 NW2d 715 (2008), *aff'd*, 483 Mich 1089 (2009), and also previously considered the question of attorney fees in *Roberts v Saffell* (*Roberts II*), unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 295500). In *Roberts I*, we reversed the trial court's judgment, following a jury trial, in favor of plaintiffs, and remanded for entry of judgment in favor of defendants. In *Roberts II*, we "determined that the trial court erred in denying defendants' request for attorney fees," and remanded to "give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." We now reverse the portion of the trial court's postjudgment order declining to award attorney fees, and affirm its alternative fee award.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendants sold plaintiffs their vacation home in Leland, Michigan in October 2003. No history of infestation by termites or carpenter ants was disclosed prior to the sale, but in a post-closing note, defendant sellers advised plaintiff buyers that "a million bugs" would hatch in the spring but not last long. Plaintiffs experienced an infestation in April 2004, which later was determined to be of termites. Plaintiffs brought a three count complaint against defendants, alleging fraudulent misrepresentation, silent fraud, and innocent misrepresentation. They subsequently amended their complaint to add a fourth claim for breach of contract. All of the

claims were premised on defendants' "no" response to a query regarding infestation on their seller's disclosure statement (SDS). *Roberts I*, 280 Mich App at 399.

Defendants moved for summary disposition on various grounds, which motion the trial court denied. *Id*. at 399-400. Less than a week before trial, plaintiffs moved to voluntarily dismiss their claims for fraudulent misrepresentation, silent fraud, and breach of contract,[1] which motion the trial court granted. *Id*. at 400. The case thus proceeded to trial solely on an innocent misrepresentation theory.[2] Plaintiffs prevailed at trial and were awarded a jury verdict that included contractual attorney fees. The trial court awarded plaintiffs additional attorney fees as case evaluation sanctions after the trial.

In *Roberts I*, this Court considered "whether a claim of innocent misrepresentation is viable within the context of a response on a seller's disclosure statement required by the SDA [Seller Disclosure Act, MCL 565.951 *et seq*.]" *Roberts I*, 280 Mich App at 405. Defendants had previously raised that issue before the trial court, both in their motion for summary disposition (which the trial court denied) and in connection with subsequent pre-trial motions (at which point the trial court reserved its ruling until the close of plaintiffs' proofs and until after defendants had moved for a directed verdict). *Id*. at 400. This Court held "that innocent misrepresentation is incompatible with the exemption from liability afforded by MCL 565.955(1) with respect to a disclosure made on an SDS [seller disclosure statement]." *Id*. at 414. Consequently, this Court found that the "trial court erred in not granting defendants' motion for summary disposition on that claim," and reversed and remanded for entry of judgment for defendants. *Id*. at 415. Our Supreme Court affirmed this Court's decision in *Roberts I*. See *Roberts I*, 483 Mich at 1090 ("the Court of Appeals correctly held that innocent misrepresentation does not constitute a viable cause of action under the SDA").

Defendants thereafter moved in the trial court for entry of judgment and an award of case evaluation sanctions under MCR 2.403 and for attorney fees under paragraph 18 of the purchase and sale agreement, which provides as follows:

> 18. ATTORNEY'S FEES: In any action or proceeding arising out of this agreement, the prevailing party, including any REALTOR (r) so involved, shall be entitled to reasonable attorney's fees and costs from the non-prevailing party.

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[1] The record suggests that plaintiffs pursued a malpractice claim against their trial counsel, but that the claim was dismissed on statute of limitations grounds.

[2] The record suggests that, for reasons that are unclear, the case nonetheless proceeded to trial as if on an intentional misrepresentation theory, which, unlike an innocent misrepresentation theory, required proof of defendants' knowledge of the infestation and of their failure to disclose it to plaintiffs. Further, the record suggests that the trial court instructed the jury on those elements, notwithstanding the fact that the remaining innocent misrepresentation claim did not require them to be proven. The jury returned a verdict in favor of plaintiffs.

Defendants requested $137,003.24 in attorney fees and costs plus statutory interest in excess of $25,000.

The trial court heard oral argument from counsel for the parties regarding the attorney fee question on October 26, 2009. After recapping the case, the court noted that justice "is essentially the notion that at the conclusion of a dispute that the right result has been reached. That people feel comfortable with the result." The court noted that here "the defendants successfully sold to the plaintiffs a home with a grossly latent defect. . . . [T]hat the defendants should seek to be reimbursed for their attorneys' fees is overreaching of the worst possible type" and "confounds the notion of justice." The court concluded that "under no circumstances would [it] voluntarily award them attorneys' fees for this." The court acknowledged that there were contractual grounds for attorney fees, because the court had awarded them to plaintiffs when they prevailed at trial. The court concluded:

> [I]f the court of appeals wishes to do it, then I hope that you, Mr. Reynolds [plaintiffs' counsel], will at least have them look at the picture or the pictures of the sistered in two by fours next to the termite riddled studs and ask them to do it with a straight face. I won't until I'm directly told to do so by the court of appeals. Motion's denied.

Defendants appealed once again. See *Roberts II*. This Court reviewed the history of the case and noted that "in the prior appeal . . . defendants did not prevail on any of the issues raised in their appellate briefs." *Id*. at 1-2. The Court nonetheless concluded that plaintiffs' suit arose out of the contract and that defendants were the prevailing party. *Id*. at 2. This Court noted that the "trial court was justifiably concerned . . . about a windfall attorney fee award to defendants. Nonetheless, we reluctantly conclude that the contract requires the trial court to hold further proceedings regarding defendants' attorney fee request." *Id*. Therefore, the Court "determined that the trial court erred in denying defendants' request for attorney fees," and remanded the case to "give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." *Id*. However, this Court declined defendants' request for a new judge on remand, stating its satisfaction that "the trial court does not hold an aversion or hostility toward defendants that cannot be set aside." *Id*. at 3.

On remand, the trial court concluded that the main issues were the timing of attorney James Saffell's services relative to trial and whether there was a failure by defendants to put in proofs regarding their attorney fees under the contract. Defendants argued that they were not required to prove such damages at trial and indicated that this Court recognized as much by not affirming the trial court on those grounds in *Roberts II*. Further, they argued that they did not prevail at trial, but only after appeal to the Supreme Court. Regarding the fees of attorney Saffell, defendants' son, defendants argued that there is no limitation on hiring relatives, that they actually paid Saffell, and that he provided valuable assistance on the case. Saffell also testified regarding his involvement in the case. At the close of defendants' argument, the following exchange occurred with the court:

> *The court:* I guess, you know, I feel better about it if somewhere along the way you discover who put in those pristine 2x4s next to termite riddled 2x4s, did you really win or did you just get lucky?

Defense counsel: We prevailed.

The court: [Plaintiffs] get cheated?

Defense counsel: No.

The court: Really?

Defense counsel: They voluntarily dismissed a cause of action going forward on innocent misrepresentation, not withstanding the law doesn't allow recovery, that's not being cheated, that's the legal process.

The court: My question is, were there in fact pristine white 2x4s sistered in next to termite riddled 2x4s, and who did that, you ever figure that out? They sue the wrong people?

Never mind, it's rhetorical.

Plaintiffs characterized the remand order as requiring "a determination of the amount of [attorney] fees" and argued that because defendants did not plead or prove attorney fee damages, the correct amount is zero. Plaintiffs further argued that Saffell was not entitled to attorney fees because much of his fees were incurred without having filed an official appearance in the case. They further emphasized that appellate success was not predicated on an issue raised by defendants on appeal. The court indicated it would issue a written opinion and quantify the attorney fee award even if it found they were not appropriate so that the parties would not be forced to argue fees once again on remand.

In its decision and order, the trial court concluded that "Defendants cheated the Plaintiffs" and that it remained "this Court's opinion that those six citizens who listened to this trial understood the case, understood their obligation to base a verdict on the Defendants' actual knowledge and failure to disclose and that the jury's verdict should be reinstated." The court concluded that defendants "should not be paid for their deception." Turning to the question of attorney fees, the court stated that "[i]f this case continues to be a vehicle for injustice . . . then attorney's fees will have to be awarded." Yet the court concluded that because "the source of the fee award arises in a contract, the fees are considered damages, not costs." The court reasoned "that the failure to make a claim for fees and offer proofs at trial now precludes Plaintiffs [sic] from an award." The court found that defendants should have brought a counterclaim, but did not, and thus because defendants "failed to claim fees as damages at trial, this Court declines to award them here."

However, the court also set forth its rationale for determining what the proper amount would be if fees were to be awarded. Here the court framed the issue as focusing on "the skill, time and labor involved, the results achieved and the difficulty of the case." The court noted that, in originally awarding plaintiffs attorney fees following the trial, it had premised the amount on the reasonable rate of $175 per hour. The court did not consider the time Saffell spent on the case before filing his appearance as warranted, and thus stated that, at a rate of $175 per hour, only $3,500 of the requested $11,000 would be warranted. The court characterized attorney Schaefer, defendants' trial attorney, as "unsuccessful" at trial, but recognized that because

defendants are the final prevailing party, he would be eligible to be compensated. To that end, the court directed he "should be fully compensated at the rate of $175 per hour," but it excepted time spent reviewing the trial transcript, casting that activity as an appellate function. The court also reasoned that appellate counsel "Bendure should not be entitled to a full fee award because the Defendants prevailed on an argument that counsel did not make." Thus, the court stated, he "is entitled to 50 percent of the hours claimed during this time period."

II. STANDARD OF REVIEW

A trial court has discretion to award attorney fees and to determine the reasonableness of the fees requested. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "Whether law of the case applies is a question of law subject to review de novo." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

III. DENIAL OF ATTORNEY FEES

On remand, the trial court determined that because defendants "failed to claim fees as damages at trial," attorney fees were not to be awarded. In arriving at this determination, the court relied upon several cases, principally *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536; 362 NW2d 823 (1985) and *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190; 555 NW2d 733 (1996).

Central Transp involved a contract dispute between a lessor and lessee regarding the lease of several trailers. *Central Transp*, 139 Mich App at 538. The lease contained a provision whereby the lessee agreed to pay "'all costs and expenses (including actual and reasonable attorney fees . . .)'" which lessor might incur enforcing its rights. *Id*. at 547. The issue proceeded to trial, and the "trial court awarded defendant attorney fees as an item of damages" under the lease terms. *Id*. at 543, 546. Plaintiff challenged a portion of the fee award. *Id*. at 547. This Court recognized that contracts which provide for the payment of reasonable attorney fees are enforceable and are considered damages. *Id*. at 548-549. However, this Court did not state that evidence on the issue of attorney fees must be submitted to the jury during the case in chief rather than at an evidentiary hearing after the prevailing party has been established.

The plaintiff in *Zeeland Farm Servs* "sought to recover the balance due on defendant's open account and the attorney fees incurred in collecting the debt as permitted by the credit agreement." *Zeeland Farm Servs*, 219 Mich App at 191-192. Plaintiff testified to the amount of attorney fees in its case in chief. *Id*. at 194. This Court recognized the legality of attorney fee provisions in contract and further noted that "[a] party claiming the right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and to avoid a directed verdict." *Id*. at 196. Although the facts indicate that the plaintiff submitted proof of attorney fees during the course of the trial, this Court did not hold that such timing was required.

Although the trial court in this case did not use the exact terminology, in essence it held that defendants' attorney fees were special damages. "Special damages are those that are

unusual for a type of claim." *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). Special damages must be specifically pleaded and proved in order to be recovered. MCR 2.112(I). The purpose of this requirement is to "provide notice to the adverse party of a damage claim that the party might not otherwise anticipate." *Fleet Business Credit*, 274 Mich App at 590.

Plaintiffs direct this Court's attention to *B&B Investment Group v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998), and *Isagholian v TransAmerica Ins Co*, 208 Mich App 9; 527 NW2d 13 (1994), in support of their claim that attorney fees are special damages that must be pleaded and proved at trial. These cases are distinguishable from the instant case. *B&B Investment Group*, 229 Mich App at 8-9, involved the pleading of special damages as an element of a claim for common law slander of title; it did not state a general rule about the necessity of pleading and proving attorney fees. In *Isagholian*, 208 Mich App at 17, this Court stated, "We need not consider the merits of plaintiff's claim that he was entitled to reimbursement of this attorney fees in light of his failure to plead such as an element of special damages." As support, the *Isagholian* Court simply cited the general court rule concerning special damages, MCR 2.112(I), and *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 107; 380 NW2d 60 (1985), (where this Court held, under the previous version of the court rule, that the trial court did not err in setting aside a portion of the judgment for certain damages, including attorney fees, not pleaded by the plaintiffs as special damages). *Isagholian*, 208 Mich App at 18. Nonetheless, the *Isagholian* Court did not establish any general rule that attorney fees sought under a contractual "prevailing party" provision constitute "special damages" that must be pleaded and proved at trial. *Id*. Moreover, the statement made in *Isagholian* was unnecessary to the determination of the case and was dicta. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006).

Further, *Fleet Business Credit* establishes that where a "contract makes it clear that attorney fees are to be recovered by the prevailing party," those fees "are not special damages." *Id*. at 591. In *Fleet Business Credit*, the third-party plaintiff asserted breach of contract and breach of warranty claims against the third-party defendant. *Id*. at 586. In answering the third-party complaint, the third-party defendant requested relief in the form of judgment in its favor as well as reasonable costs and attorney's fees. *Id*. The third-party plaintiff prevailed at trial and received a jury verdict, but this Court ultimately reversed and directed that judgment be entered in the third-party defendant's favor. *Id*. at 587-588. The third-party defendant then moved the trial court for costs and attorney fees, based on a provision in the contract at issue that provided that "in any proceeding arising from or relating to this agreement, the prevailing party shall recover it's [sic] costs and reasonable attorney fees." *Id*. at 585-586 (emphasis removed). The trial court denied the motion on the grounds that the third-party defendant had not specifically pleaded and proved attorney fees as special damages. *Id*. at 588.

This Court held:

> Under the particular facts of this case, we hold that the attorney fees allowed by the contract are not special damages. The contract makes it clear that attorney fees are to be recovered by the prevailing party. . . . There can be no dispute that the third-party complaint by [the third-party plaintiff] against [the third-party defendant], and the resulting trial and prior appeal (i.e., the

> proceedings in which the costs and attorney fees were incurred), were "proceeding[s] arising from or relating to the agreement[.]" We hold that there could be no surprise to [the third-party plaintiff] that [the third-party defendant] would seek attorney fees, because they are allowed by the contract. Thus, the trial court erred in holding that Market Scan was required to specifically plead its attorney fees as special damages. [*Id*. at 591-592.]

Nearly the identical situation exists in the instant case. Defendants answered plaintiffs' complaint and requested "that the Court dismiss Plaintiffs' Complaint and award defendants their attorney's fees and costs, and provide such other relief, to the fullest extent authorized by equity and law." Plaintiffs prevailed at trial, but defendants ultimately prevailed after appeal. The claim for attorney fees was based on the "prevailing party" contract provision at issue in the proceedings. *Fleet Business Credit* therefore controls, and dictates that we reverse the trial court in this respect.

In any event, the trial court in this case was bound by the law of the case to award defendants' their reasonable attorney fees under the contract. We are similarly bound. Under the law of the case doctrine, "an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case applies to explicit or implicit issues actually decided. *Id*. However, the doctrine "does not apply to an issue that was raised but not decided by an appellate court." *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994).

In *Roberts II*, this Court found defendants to be the prevailing party and held that the contractual attorney fee provision applied. *Roberts II*, unpub at 2. After determining that the trial court erred in failing to grant defendants' attorney fee request, this Court "remand[ed] this case to the trial court to give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." *Id*. Further, the court declined to address the defendants' request for case evaluation sanctions because of its conclusion that the attorney fee provision was applicable. *Id*. at 2.

Although it was reluctant to do so,[3] this Court held that the contract required "the trial court to hold further proceedings regarding defendants' attorney fee request." *Roberts II*, unpub at 2. The Court clearly held that "the plain language of the contract provision mandates the award of attorney fees to the prevailing party," determined to be defendants following the results reached on appeal to this Court and the Michigan Supreme Court. *Id*. Thus, the case was remanded "to the trial court to give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." *Id*.

[3] There is no indication the Court's reluctance stemmed from a disagreement with the legal basis for the decision reached. It seems likely, although uncertain, that the Court, like the trial court, was troubled by the facts of the case.

The contract does not specify that the attorney fees must be established at trial. But rather than give the defendants the opportunity ordered by this Court, the trial court again denied their fee request. This Court determined that defendants were the prevailing party and that they thus were contractually entitled to an award of reasonable attorney fees. The trial court was bound by that decision and was directed to establish those fees.

In sum, the decisions cited do not create a requirement in law that a party must plead and prove attorney fee damages at trial where the fees are based on a contractual prevailing party provision. Further, the law of the case required the trial court to provide defendants the opportunity, on remand, to establish the amount and reasonableness of their attorney fees. Accordingly, we reverse the trial court's denial of defendants' request for reasonable contractual attorney fees.

IV. ALTERNATIVE FEE AWARD

The trial court alternatively articulated its rationale for determining reasonable attorney fees, presumably in anticipation that this Court might overturn its denial of fees. Defendant bears the burden of proving the reasonableness of the requested fees. *Smith*, 481 Mich at 528. A trial court's fee analysis begins "by determining the fee customarily charged in the locality for similar legal services" for which "the court should use reliable surveys or other credible evidence of the legal market." *Id*. at 530-531. The customary fee should then be multiplied by the hours expended. *Id*. at 531. This is a starting point and the court should then consider the "remaining *Wood*[4]/MRPC factors to determine whether an up or down adjustment is appropriate." *Id*. Those eight factors are:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

[4] *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982).

(8) whether the fee is fixed or contingent." [*Id*. at 530, quoting MRPC 1.5(a).]

"[I]n order to aid appellate review, a trial court should briefly discuss its view of the remaining factors." *Id*. at 531.

In originally deciding (after trial) the amount of case evaluation sanctions available to plaintiffs, the trial court considered the affidavit, billing record, and standing of plaintiffs' counsel. Further, the court considered the local economics of law practice. Using that resource, the court reduced plaintiffs' claimed hourly rate from $225 to $175. Further the court concluded the "reasonable number of hours even on a trial day would not exceed 12 hours."

In alternatively articulating, after *Roberts II*, the fee award that the court would deem proper (to defendants) if its denial of fees was overturned, the court first noted that

> there is no challenge to the professional standing or experience of counsel for the Defendants nor to the expenses incurred. The nature and length of the professional relationship between the clients and defense counsel is also not seriously questioned. In fact, one of the attorneys seeking compensation is the Defendant's son. Rather, the challenge focuses on the skill, time and labor involved, the results achieved and the difficulty of the case.

The trial court then considered the relevant factors. It awarded trial counsel Schaefer his hours expended at a rate of $175, which is consistent with the court's prior analysis, but did "not approve Mr. Schaefer's requested fees for reviewing the trial transcript," because it found that defendants had paid appellate attorney Bendure for transcript review and preparation of the brief on appeal. Regarding attorney Saffell, defendants' son, the court declined to award any fee "for attendance at a trial when he had not appeared in the case and did not sit at counsel's table." Further, the court declined to award any fees for Saffell's work on defendants' appeal prior to filing an appearance, finding that "[a]t best, Mr. Saffell was overlooking his [Bendure's] work as a liaison between Mr. Bendure and his parents. There is no evidence that this intermediate review enhanced the quality of Mr. Bendure's work product or contributed substantively to the appellate effort." Finally, the court reduced Saffell's billed work after his formal appearance (which was entered following the Supreme Court's affirmance of this Court's decision in *Roberts I*) from $11,000 requested to $3,500 (representing 20 hours of labor at an rate of $175) based on a "review of the substantive documents filed" after our Supreme Court's order affirming this Court's decision in *Roberts I*."

Lastly, regarding appellate counsel Bendure, the court compensated his hours expended at a rate of $175 and only allowed "50 percent of the hours claimed" for the first appeal, on the theory that this Court had reversed on an issue not briefed or argued by either party, and that therefore Bendure was not entitled to a full fee award.

We hold that the trial court did not abuse its discretion in making this alternative fee award. With regard to Schaefer, he was fully compensated for his trial work, and the trial court did not err in disallowing a charge for post-trial review of the transcript in light of the fact that Bendure was paid to review the transcript on appeal. With regard to Saffell, he did not appear as

an attorney of record in either *Roberts I* or *Roberts II*. Saffell did submit invoices for work performed prior to 2009; however, as Schaefer also billed for substantial work during this period, it is unclear to what extent Saffell's work was actually utilized at trial (at which, again, defendants did not prevail). For example, Saffell billed for brief and motion drafting and legal research, as did Schaefer. The trial court did not abuse its discretion in refusing to award Saffell requested attorney fees for work essentially duplicated by the attorney of record. See *McAuley v General Motors Corp*, 457 Mich 513, 525; 578 NW2d 282 (1998) ("The trial court appropriately deducted . . . for duplicative work made necessary by the substitution of plaintiff's counsel. . . . [T]hese types of expenses are properly excluded when determining what constitutes a reasonable attorney fee."); see also *Smith*, 481 Mich at 534 (stating that the trial court should consider whether it was reasonable for plaintiff to have two lawyers "on the clock" during a trial). Further, the trial court did not abuse its discretion in awarding only a portion of the $11,000 requested by Saffell after he filed an appearance. Saffell drafted a motion for entry of judgment, four pages in length, and a brief in support, also four pages. Saffell also appeared at the motion hearing; the motion was denied. Saffell did not work on the appeal of that denial. Saffell later prepared and filed straightforward post-remand documents. The trial court did not err in reducing Saffell's fee, especially given that much of his work was unsuccessful.

With regard to Bendure, the trial court recognized that his efforts deserved compensation, but also held that he was not entitled to the full amount of his fees because this Court in *Roberts I* ultimately reversed on an issue not raised by defendants on appeal. Although in the context of statutory, rather than contractual, attorney fees, the United States Supreme Court has stated that "The mere fact that plaintiffs do not prevail on every claim does not preclude an award of fees for all work reasonably performed, but it is rarely an abuse of discretion to refuse to award fees for work done on non-prevailing claims that are not closely related to the relief obtained." *Hensley v Eckerhart*, 461 US 424, 452-453; 103 S Ct 1933; 76 L Ed 2d 40 (1983).

In the instant case, defendants argued in *Roberts I* that plaintiffs could not recover under the SDA without proof of actual or constructive knowledge of the termite infestation on the part of defendants. Defendants further argued that the trial court erred in excluding certain evidence as hearsay and erred in failing to sanction plaintiffs for alleged spoliation of evidence. Defendants' argument regarding the SDA is arguably related to this Court's ultimate holding that there is no liability under the SDA for "a disclosure made on an SDS under a theory of innocent misrepresentation." However defendant's other arguments were not related to the grounds on which this Court ultimately granted reversal. Under these circumstances, we conclude that the trial court did not abuse its discretion in reducing Bendure's award by fifty percent.

In sum, we conclude that the trial court's alternate fee award was within its discretion, and we affirm that portion of the trial court's decision and order. Because we remand only for such further proceedings as are necessary to secure the entry of an order granting the fee award

as detailed in the trial court's August 27, 2012 order, we need not address defendants' request that this matter be assigned to a different judge on remand.[5]

Reversed in part, affirmed in part, and remanded for such further proceedings as are necessary to secure the entry of an order awarding attorney fees consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[5] Because we conclude that attorney fees are properly awarded under the contract, we need not address defendants' alternate contention that attorney fees could be properly awarded as case evaluation sanctions. However, our review of the record indicates that the trial court did not err in declining to award attorney fees as a case evaluation sanction under the "interest of justice" exception, MCR 2.403(O)(11). Specifically, the issue upon which defendants ultimately prevailed (whether liability existed under the SDA for innocent misrepresentations made on an SDS) was an issue in which there was "a public interest in having an issue judicially decided rather than merely settled by the parties." *Luidens v 63rd Dist Court*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996). Moreover, "[o]ther circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." *Id*. at 36. The trial court concluded, notwithstanding the ultimate outcome of this case given its procedural posture at the time of the trial and subsequent appeals, that defendants had engaged in misconduct such as rendered an award of case evaluation sanctions contrary to the interest of justice. We find no reversible error in the trial court's denial of case evaluation sanctions.